Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

NICOLE ALLEN VERS, an Incompetent Person, by her Permanent Conservator, and Guardian ad Litem, JOSEPH VERS; and KARI NICOLE VERS, a minor, by JOSEPH VERS, her Guardian ad Litem

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

Through counsel, plaintiffs' Guardian *ad litem* rejected defendant United States of America's settlement offer which was to be effected by the purchase of an annuity. Based on this rejection, on motion of the United States Attorney, the District Court removed the Guardian *ad litem* and his counsel, and appointed ***pro bono*** replacements, who promptly accepted the previously rejected offer of defendant United States of America. The questions presented here are:

1. Does a duly appointed Guardian *ad litem* have standing to seek review of the order of his removal and that of his counsel?

2. Does an attorney's fees agreement, calling for fees authorized by the Federal Tort Claims Act, and of the form authorized by the California Rules of Professional Conduct, constitute any conflict of interest?

3. Does a party have standing, to bring a motion to remove an adversary's Guardian *ad litem*, on the alleged basis, that said Guardian is not acting in the best interests of the adversary?

4. Does a party have standing, to bring a motion to remove counsel for an adversary's Guardian *ad litem*, on the alleged basis, that said counsel is not acting in the best

interests of the adversary?

5. May the alleged acts, omissions or statements of counsel for a Guardian *ad litem*, made during settlement discussions, constitute a basis for removal of either the Guardian or the Guardian's counsel?

6. May a Guardian *ad litem*, or his counsel, be removed solely upon the hearsay declaration of opposing counsel (in this case, an Assistant United States Attorney), as to the alleged acts, omissions and assertions of the Guardian's counsel during settlement discussions?

7. May the statement of counsel for a Guardian *ad litem*, during settlement discussions, to the effect that any settlement must take into account attorney's fees, constitute a basis for removal of either the Guardian or his counsel?

8. Is an annuity, issued by a private insurer, with no guarantee that the issuing insurer will remain solvent, a necessary component of a settlement structured to provide long-term care for an incompetent plaintiff?

9. May the refusal of a Guardian *ad litem* to consider settlement based upon an annuity, issued by a private insurer, with no guarantee that the issuing insurer will remain solvent, constitute a basis for removal of the Guardian or the Guardian's counsel?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nicole Allen Vers and Kari Nicole Vers respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 8, 1998, which judgment chills the right of advocacy to seek redress for injuries suffered by civil plaintiffs. Although defendant United States of America is the beneficiary of this particular instance of denial of Due Process, the action of the District Court strikes at all civil plaintiffs, whether or not the United States of America is defendant.

OPINIONS BELOW

The April 8, 1998, memorandum opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition was unpublished by order of the Ninth Circuit. It is reprinted in Appendix A hereto. The May 20, 1998, order of the Ninth Circuit denying petitioners' petition for rehearing and suggestion for rehearing *en banc* is reprinted in Appendix B hereto. The August 12, 1996, order of the Ninth Circuit, denying petitioners petition for Writ of Mandamus to review the issues presented herein, is reprinted in Appendix C hereto. The March 24, 1997, order of the United States District Court for

the Central District of California, dismissing the action below pursuant to stipulation, is reprinted in Appendix D hereto. The September 12, 1996, order of the United States District Court for the Central District of California, appointing *pro bono* Guardian *ad litem* and counsel for Nicole Allen Vers and Kari Vers, is reprinted in Appendix E hereto. The August 2, 1996, order of the United States District Court for the Central District of California, removing Joseph Vers as Guardian *ad litem* and Nathaniel J. Friedman as counsel for Nicole Allen Vers and Kari Vers, is reprinted in Appendix F hereto.

JURISDICTION

On April 8, 1998, the Ninth Circuit dismissed petitioners' appeal from the judgment of the District Court for "lack of standing." The Ninth Circuit entered judgment on that date. On May 20, 1998, the Ninth Circuit denied rehearing and petitioners' suggestion that rehearing be conducted *en banc*. The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 **U.S.C.** §1254(1). By its August 12, 1996, order, the Ninth Circuit previously denied extraordinary relief to review the issues presented herein.

STATEMENT OF THE CASE

Both the Guardian *ad litem* (husband and father of plaintiffs) and counsel, for petitioners, plaintiffs below, Nicole Allen Vers[1] and Kari Nicole Vers,[2] were removed, because the District Court, Honorable Terry J. Hatter, Judge of the United States District Court, presiding, concluded that counsel's statutory contingency fee agreement[3] with the Guardian *ad litem*, created for counsel and Guardian *ad litem* an irreconcilable conflict of interest with petitioners. Judge Hatter replaced counsel and Guardian *ad litem* with two attorneys appointed to act ***pro bono***. These replacement representatives, without consulting any relative or representative of petitioners, acceded to the offer of settlement by defendant United States of America, the identical offer rejected by the original counsel and

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[1]comatose due to admitted negligence of defendant United States of America

[2]newborn daughter of Nicole, whose birth occurred moments before the admitted negligence of health care providers, employed by defendant United States of America.

[3]pursuant to 28 U.S.C. 2678, form of the agreement was customary in the profession, as approved by the State Bar of California, and consistent with the American rule for attorney's fees

Guardian *ad litem* as wholly inadequate, given the severity of the damages suffered by petitioners. Contrary to the representations of the Assistant United States Attorney, that she was interested in seeing that the mother, Nicole Allen Vers, had funds for her support so long as she should live, the "settlement" provided no money to either petitioner Nicole Allen Vers, the comatose mother, or her estate, leaving the entire cost and burden of her care to the State of California.

The original Guardian *ad litem*, represented by the original counsel, brought an appeal on behalf of petitioners, challenging his removal and that of his counsel. The Ninth Circuit Court of Appeals dismissed the appeal, holding, that "A plaintiff may not 'appeal from a joint stipulation to voluntary dismissal, entered unconditionally by the court pursuant to a settlement agreement.'" Following is the chronology of this case in the courts below.

On November 4, 1994, plaintiff and petitioner Nicole Allen Vers, then 20 years of age, gave birth to a healthy baby girl, plaintiff and petitioner Kari Vers, at the United States Naval Hospital in 29 Palms, California. As a direct and proximate result of the negligence of attending physicians, employees of defendant United States of America, at the Naval Hospital, Mrs. Vers was allowed to uncontrollably hemorrhage,

lost consciousness, has not regained consciousness, and remains comatose. She is unable to care for herself or give her husband and daughter the care and comfort to which they are entitled. Cpl. Joseph Vers, United States Marine Corps, husband of Nicole and father of Kari, was appointed Conservator of Nicole and Guardian *ad litem* for Kari in California state courts. For simplicity, he will be referred to as Guardian *ad litem* for both. The requisite administrative claims were filed and denied and a lawsuit was instituted.

Petitioners' complaint against defendant United States of America for medical malpractice, pursuant to the Federal Tort Claims Act (the "***FTCA***"), 28 U.S.C. § 2671, ***et seq***, was filed on September 29, 1995, in the United States District Court for the Central District of California. The District Court assumed subject matter jurisdiction pursuant to 28 **U.S.C. §** 1346(b).

On July 1, 1996, a voluntary settlement conference was conducted by the Honorable David V. Kenyon, Judge of the Federal District Court. Following the voluntary settlement conference, the United States Attorney noticed a motion for July 29, 1996, requesting that both the Guardian *ad litem* and counsel for petitioners, be removed, the sole basis being hearsay declarations of Julie Zatz, Assistant United States

Attorney, as to the alleged acts, omissions and assertions of counsel for the Guardian *ad litem* **at the voluntary settlement conference**. Section III below reprises the entirety of the alleged "misconduct" set out in the motion of respondent United States of America. Although petitioners dispute the accuracy of these hearsay declarations, they may be summarized as (1) the Guardian *ad litem* and counsel for said Guardian, refused to accept a settlement based on an annuity issued by a private insurer, and (2) counsel for said Guardian asserted his interest in attorney's fees as a consideration as to the amount that petitioners required to settle. The motion was granted by Honorable Terry J. Hatter, Judge of the United States District Court, and on August 2, 1996, Judge Hatter entered his order removing the original counsel and Guardian *ad litem*.

On September 12, 1996, replacement counsel and Guardian *ad litem* were appointed by the District Court to act on a ***pro bono*** basis.

On October 22, 1996, defendant United States of America filed a Notice of Admission of Liability.

On February 20, 1997, the ***pro bono*** replacement counsel and Guardian *ad litem*, without consulting any relative or representative of petitioners, entered into a stipulation for a purported settlement with defendant United States of America,

on the identical terms rejected by the original counsel and Guardian *ad litem*. That "settlement" provided no compensation to either petitioner Nicole Allen Vers, the comatose mother, or her estate, leaving the entire cost and burden of her care to the State of California. On March 24, 1997, the Order of Dismissal pursuant to that settlement was entered.

On April 7, 1997, Joseph Vers, still duly appointed Conservator and Guardian *ad litem* for petitioners, filed a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Ruling Denies Any Meaningful Appellate Review Of A Settlement Entered Into By A Guardian *Ad Litem* On Behalf of An Incompetent or Infant

At all times mentioned herein, petitioner Nicole Allen Vers was comatose, unable to communicate with her Guardian *ad litem*. At all times mentioned herein, petitioner Kari Nicole Vers was an infant, no more than four years old. If, as the Ninth Circuit has ruled, any settlement entered into on behalf of such incompetents, is not subject to appellate review, because

it was "voluntarily entered into," then the appointed representative for any such incompetent is conclusively presumed to be competent and to have acted properly. The mere statement of such proposition demonstrates its absurdity. Such a holding presents a finite probability that inadequate settlements, if not actual mischief, will be perpetrated on such incompetent parties.

At the very least, the District Court's appointment of ***pro bono*** counsel who acceded to the patently inadequate settlement offer of respondent United States of America, has the appearance of collusion among those three entities.

> "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Marshall v. Jerrico, Inc., [1980] 446 U.S.[238], at 243, 100 S.Ct., at 1613. ***Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*** (1993) 508 U.S. 602, 618

II. District Court's Removal Has A Chilling Effect On The American Legal System And Is In Violation Of Both Federal Rules Of Evidence And Its Own Rule

There is a valid reason for keeping confidential all settlement discussions. If such discussions were to be subject to future use in the same litigation, then no Guardian *ad litem* or counsel would discuss settlement options frankly. This would chill the possibility of settlement in virtually all cases, and frustrate the courts of this country by requiring far more trials than are currently conducted. Although this maxim requires but few words to state, and does not require hyperbole, the chill imposed on vigorous advocacy by the action of the District Court has the temperature of a howling snowstorm.

This Court has consistently upheld the right to vigorous advocacy:

> [T]he need for forceful and vigorous advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not passed over is of paramount importance in our adversary system of justice, whether at the trial or the appellate stage. ***Penson v. Ohio*** (1988) 488 U.S. 75, 76.

> If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to

> conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. ***Gedders v. United States*** (1976) 425 U.S. 80, 93 (Justice Marshall concurring, joined by Justice Brennan)

Federal Rule of Evidence 408, dictates that "[e]vidence of conduct or statements made in settlement discussions" "is not admissible to prove liability for or invalidity of the claim or its amount." By considering hearsay of the voluntary settlement conference, the District Court violated **FRE** 408 by using the hearsay acts, omissions and statements of counsel for the Guardian *ad litem*, to convince itself that petitioners' refusal to accept settlement in the form of an annuity issued by a private insurer, rendered petitioners' claim invalid.

Even more restrictive than **FRE** 408, **Rule** 23.9 of the ***Local Rules of The United States District Court, Central District Of California***, dictates:

> All settlement proceedings shall be confidential and no statement made therein shall be admissible in any proceeding in the case, unless the parties otherwise agree.

Similar to the proscription of the First Amendment, so often invoked by Justice Black, that "Congress shall make no law . .

. .," **Rule** 23.9 permits no exception to the proscription that there shall be no involuntary use of **any statement** made during settlement discussions. By using the hearsay declaration of the Assistant United States Attorney. Ms. Zatz, as to statements of counsel for the Guardian *ad litem*, allegedly made in settlement discussions, for the purpose of removing the Guardian *ad litem* and his counsel, the District Court egregiously violated its own rule—a rule that is deeply rooted in the sound public policy to encourage the settlement of legal disputes.

By violating both FRE 408 and Local Rule 23.9, the District Court created a glacial chill on the effectiveness of legal advocacy in this country. Even though the Ninth Circuit's memorandum opinion is not published, make no mistake that every Assistant United States Attorney in the Central District of California, if not the entire country, has been advised of Ms. Zatz' successful tactic, and this blatant tactic will be repeated in the future, unless there is judicial review of this egregious tactic of the United States Attorney, countenanced and ratified by the District Court.

III. Alleged Acts, Omissions And Statements Of Counsel During Settlement Discussions

Following are the entirety of the hearsay references in the Motion [of defendant United States of America] for

Appointment of Attorney/Guardian for Plaintiffs Nicole Allen and Kari Nicole Vers (hereinafter, "Removal Motion") as to the acts, omissions and statements of counsel for the Guardian *ad litem*, which statements purportedly evince conflicts of interest among the Guardian *ad litem*, the Guardian's counsel and petitioners:

> It has become abundantly clear that plaintiff Joseph Vers, as an individual, has an irreconcilable conflict of interest in his representation of his wife Nicole and daughter Kari. This conflict arises because, Mr. Vers is interested in a recovery, the dominant feature of which is a lump sum of money payable to him in both his individual and representative capacities, while Mrs. Vers' lifetime medical care needs and her daughter Kari's future needs may be better served by a medical trust and annuity which would guarantee that Mrs. Vers' medical needs will be provided and the costs paid for the duration of her life. Through his retained counsel, Nathaniel Friedman, Mr. Vers has repeatedly stated that his interest is in a cash settlement which may or may not prove adequate to meet Mrs. Vers medical needs for the rest of her life. (Removal Motion, page 3, lines 13-25, hereinafter, "3:13-25").
>
> Through counsel, the parties had several conversations regarding settlement. For the purpose of these discussions, the United States has accepted in its near entirety, plaintiffs'

rehabilitationist/lifecare expert's testimony regarding the nature, extent and costs of Mrs. Vers future medical care. Moreover, despite disagreement with plaintiffs concerning Mrs. Vers ultimate life expectancy, defense counsel has informed plaintiffs' counsel, that she was prepared to recommend a settlement that would provide for Mrs. Vers' medical care for the rest of her life, no matter how long that might be. During these discussions, Mr. Friedman expressed concern that the cost of such a plan, and the "upfront" cash to fund the plan, was somehow not sufficient for his analysis or to fund his anticipated attorney's fees. Declaration of Julie Zatz at ¶5. (Removal Motion, 4:25-5:11)

On July 1, 1996, a settlement conference of approximately 35 minute duration was held in this matter before the Honorable David V. Kenyon. [Declaration of Julie Zatz] at ¶¶2,6. During this entire conference, Mr. Friedman failed to inquire as to what type of settlement counsel was prepared to recommend. Mr. Friedman again insisted that a settlement along the lines described above would not present a high enough "upfront" cost to the United States to fund his fees. [Declaration of Julie Zatz at ¶6. In response to Judge Kenyon's comments to the effect that he may have a conflict of interest, Mr. Friedman asserted that he was entitled to be concerned about his attorneys' fees. [Declaration of Julie Zatz] at ¶7. [FN 1] (Removal Motion, 5:12-22)

> FN 1: Under the FTCA, counsel may be entitled to as much as twenty five per cent of any judgment or settlement. 28 U.S.C. § 2678. Accordingly, Mr. Friedman's apparent interest in increasing the "upfront" cost of any settlement is to increase his ultimate fee. (Removal Motion, 5:n1)

During the course of the settlement conference, Judge Kenyon expressed concerns about Mrs. Vers' life expectancy and the impact certain types of settlements may have on Mrs. Vers' longevity and financial security. In response, Mr. Friedman stated that he would not counsel Mr. Vers to interfere with his wife's life expectancy. However, he agreed that a lump sum payment could result in Mrs. Vers running out of money to pay for her long term medical costs should she live beyond plaintiffs' expert's projected life expectancy. Mr. Friedman stated that was simply a risk she would have to take. [Declaration of Julie Zatz] at ¶8. (Removal Motion, 6:1-10)

. . . .Mr. Vers, through Mr. Friedman, has repeatedly shown his refusal to act in his wife and daughter's best interest. For example, Mr. Vers has hired the same attorney (Mr. Friedman) to represent him in his personal capacity, as well as in his representative capacity. Therefore, the type of recovery (or settlement) that is in the optimum interests of the parties is, or can be, in direct conflict —

> which has already been manifest in this case. This severe and irreconcilable conflict of interest has been exemplified through Mr. Friedman's conduct of the settlement negotiations. During the settlement conference and prior thereto, Mr. Friedman has declined to discuss defendant's proposal that would ensure Mrs. Vers receive continued treatment and care for the rest of her life, however long that time may be. Declaration of Julie Zatz at ¶6. Instead, Mr. Friedman insists on a lump sum payment and had candidly admitted that payment of a large sum is necessary to ensure payment of his attorney's fees and that, in the future, these funds could run out, leaving Mrs. Vers destitute. [Declaration of Julie Zatz at ¶6.] (Removal Motion, 11:10-12:2]
>
> Additionally, Joseph Vers has a conflict of interest with Nicole and Kari because all three parties are competing for **limited settlement funds**. (Emphasis Added) (Removal Motion, 12:3-5)

The foregoing is the entirety of the "evidence" and argument upon which defendant United States of America based its assertion that plaintiffs had an irreconcilable conflict of interest with their Guardian *ad litem* and the Guardian's counsel.

IV. Even If Acts, Omissions And Statements Made During Settlement Discussions Were Admissible, District Court Abused Its Discretion, Because No Basis To Conclude That Said Acts, Omissions And Statements Of Counsel Evince Irreconcilable Conflict Of Interest

Assuming ***arguendo***, that Judge Hatter properly entertained the hearsay recitation of the Assistant United States Attorney, Ms. Zatz, as to the acts, omissions and statements of counsel for the Guardian *ad litem*, the articulated conduct does not evince a conflict of interest between petitioners and either Guardian *ad litem* or his counsel. There is no evidentiary basis for Judge Hatter's removal of the original Guardian *ad litem* and counsel. Ms. Zatz' hearsay recitations can be reduced to two complaints, (1) that petitioners refused to consider settlement in the form of an annuity, and (2) that petitioners had to consider their liability for attorney's fees in determining whether to settle or go to trial.

A. Refusal To Consider Settlement In Form Of Annuity Does Not Evince Conflict Of Interest

First, as to the complaint that the Guardian *ad litem* and his counsel refused to consider settlement in the form of an annuity issued by a private insurer: Contrary to the contention of the United States Attorney, the refusal of the counsel and

Guardian *ad litem* to accept settlement in the form of a privately issued annuity, was in the best interests of petitioners, who would be greatly prejudiced if their future care was decimated by the failure of the private insurer. When defendant United States of America proposed settlement with petitioners based on the purchase of an annuity, it knew full well, the reality of annuities---issuers of annuities, usually insurance companies, can, ***and do***, declare bankruptcy, leaving their obligees devastated. This reality has recently been articulated in ***Linebarger v U.S.*** (N.D. Cal 1996) 927 F Supp 1280, in which defendant United States of America, under the terms of a settlement agreement, was permitted to purchase an annuity from a private insurer to acquit its obligations to Linebarger. The insurer from which the annuity was purchased, declared bankruptcy. Linebarger moved the District Court to compel defendant United States of America to pay him the monies that he expected under the terms of the annuity. Defendant United States of America opposed the motion.

The ***Linebarger*** court denied the motion, holding that defendant United States of America could only enter into a lump-sum settlement under the ***FTCA***, and its obligation ended once the lump sum payment to the issuer of the annuity was made. This was precisely the risk faced by petitioners herein,

in considering the not guaranteed annuity offer.

Linebarger, cited ***Hull by Hull v United States*** (10th Cir 1992) 971 F2d 1499, 1505, ***cert den'd*** 507 US 1030, the primary case relied upon by defendant United States of America, for the proposition that the United States of America cannot settle ***FTCA*** cases other than by lump-sum payments. As Congress has provided for periodic payments in other statutes which provide compensation for injuries, e.g., ***The Longshoremen and Harbor Workers' Compensation Act***, 33 USC §§ 914(a),(b), Congress could have provided for periodic payments in the ***FTCA***, but chose not to do so. ***See***, ***Metropolitan Stevedore Co. v Rambo*** (1997) ___ US ___, 117 S.Ct. 1953, 1960n4; 138 L.Ed. 327.

The ***Linebarger*** case, however, illustrates a much more important point: It is not so much what type of payment that defendant United States of America can make, but rather, there is no authority compelling a plaintiff to accept an annuity, or any type of payment other than a lump-sum award or settlement.

Despite the lesson of ***Linebarger***, defendant United States of America asserted the following misleading clauses in its Removal Motion, that

> (1) petitioner Nicole Vers: "*may* be better served by a medical trust and an annuity which would *guarantee* [payments] . . . for the duration of [Mrs. Vers'] life." (Emphasis added) (Removal Motion, 3:19-22)
>
> (2) the Assistant United States Attorney "was prepared to recommend a settlement that would provide for Mrs. Vers' medical care for the rest of her life, no matter how long that might be." (Removal Motion, 5:5-7)
>
> (3) respondent United States of America had made a "proposal that would ensure Mrs. Vers receive continued treatment and care for the rest of her life, however long that time may be." (Removal Motion, 11:21-23)

Not only were these statements misleading, but they were disingenuous, because the ultimate "settlement" provided no compensation to the comatose mother, petitioner Nicole Allen Vers, transferring the entirety of the responsibility for her care and treatment to the State of California. Despite the plaintive tone of the Assistant United States Attorney that the counsel and Guardian *ad litem* did not have the best interests of petitioners at heart, where in the "settlement" did respondent United States provide the "lifetime" support that its Assistant United States Attorney promised in her papers?

Lest there be a tendency to ascribe inadvertence to this repetition of misleading clauses, one need only look to the above cited misrepresentation of the Assistant United States Attorney, that respondent United States of America has "limited settlement funds." (Removal Motion, 12:3-5)

Defendant United States of America presented no evidence, in fact, there could be no such evidence, that an annuity ***would guarantee*** periodic payments for the duration of the needs of petitioners. Despite any evidence that purchase of an annuity would guarantee periodic payments for the duration of the needs of petitioners, Judge Hatter obviously ***concluded without evidentiary basis*** that defendant United States of America had offered settlement that ***guaranteed*** periodic payments for the duration of the needs of petitioners. It was an abuse of discretion for Judge Hatter to grant the Removal Motion based on this unfounded conclusion.

B. Consideration Of Attorney's Fees In Evaluation of Settlement Offer Does Not Evince Conflict Of Interest.

Second, as to the alleged statement of counsel for the Guardian, that his attorney's fees must be considered when deciding whether petitioners should settle: The alleged statement, if true, merely shows that said counsel was acting

consistent with the American rule for attorney's fees, which this Court has consistently reaffirmed:

> Under the longstanding "American rule," attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization. ***Key Tronic v. United States*** (1994) 511 U.S. 809, 809.

> Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. See F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., supra, at 128-129, 94 S.Ct., at 2164- 2165. In F.D. Rich, this Court rejected the argument that attorney's fees should be awarded under the Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U.S.C. S 270a et seq., because the Act provided for recovery of "sums justly due," 40 U.S.C. S 270b(a), and, unless fees were awarded, the legislative intent in favor of full compensation would be frustrated. 417 U.S., at 128, 94 S.Ct., at 2164. In squarely rejecting this claim, we found it to be nothing more than a "restate[ment] of one of the oft-repeated criticisms of the American Rule." Ibid. Although this Court acknowledged that "**there is some force to the argument that a party who must bear the cost of his attorneys' fees out of his recovery is not made whole**," we concluded that the countervailing considerations

> which support the American Rule argue against placing exclusive reliance on the need to provide full compensation. [Emphasis Added] ***Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters And Joiners of America*** (1982) 456 U.S. 717, 724

> We do not purport to assess the merits or demerits of the 'American Rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, [footnote omitted] and courts have been urged to find exceptions to it. [footnote omitted] It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desireable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals. [footnote omitted] ***Alyeska Pipeline Service Company v. The Wilderness Society*** (1975) 421 U.S. 240, 270

The most recent affirmation by this Court that contingent attorney's fees agreements are the *sine qua non* of our system of advocacy was by Justice Ginsburg:

> the interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. . . . The policy at the

> very core of the class action mechanism is to . . . provide the **incentive** . . . worth someone's (usually an attorney's) labor. (Emphasis added) ***Amchem Products, Inc. v Windsor*** (1997) ___ US ___, 117 S.Ct. 2231, 2246, citing ***Mace v Van Ru Credit Corp.*** (1997) 109 F3d 338, 344

V. Rationale Of District Court Violates Federal And State Law

The District Court obviously based removal of both the Guardian *ad litem* and counsel on the fallacious proposition that an attorney with a contingent fees agreement with a client, has an irreconcilable conflict of interest with that client, **notwithstanding that the attorney's fees are expressly authorized by the *FTCA*, the attorney's fees are consistent with the American rule for attorney's fees, and the form of the agreement conforms with The Rules Of Professional Conduct in California.**

It is a serious matter when counsel is removed from representation against his will and that of his client. In this instance, Judge Hatter cavalierly ruled that counsel for the original Guardian *ad litem*, acted against the best interests of petitioners because said counsel comported himself consistent with 28 **U.S.C. § 2678**, the American rule for attorney's fees, and the California Rules of Professional Conduct. Further,

Judge Hatter's removal of a Guardian *ad litem* and Conservator, ***duly appointed by a state court and still in good standing with said state court***, presents a justiciable friction between federal and state jurisdiction.

Although the ***Federal Rules of Evidence***, the ***Local Rules of The United States District Court, Central District Of California***, and case law, only some of which is cited above, demonstrate that Judge Hatter blatantly abused his discretion, all of this authority is merely affirmation of the Fifth Amendment mandate that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

By removal of their Guardian *ad litem* and counsel, petitioners have been deprived of both the **liberty** to select their representatives, and **property**, a settlement meeting with the approval of the original Guardian *ad litem* and counsel, who have always had petitioners best interests in mind.

Judge Hatter has paternalistically decreed that it is in the best interests of petitioners that they settle for a non-guaranteed annuity (which was wholly inadequate), rather than have their claim decided by the process of trial. Interestingly, Judge Hatter did not require that comatose petitioner Nicole Allen Vers receive an annuity, or any other form of compensation, when he approved the "settlement." By this

egregious abuse of his discretion, he has shifted the entirety of the responsibility for the care and treatment of comatose petitioner Nicole Allen Vers, from the culpably negligent respondent United States of America, to the State of California, since respondent United States of America has provided **no** annuity, or other form of compensation, to either petitioner Nicole Allen Vers or to her estate.

As shown above, the contingent fees agreement is consistent with 28 **U.S.C. § 2678**, the American rule for attorney's fees and the **California Rules of Professional Conduct**. If the District Court is not reversed, litigants in that court, and many other courts, can anticipate similar rulings based on the court's fallacious perception.

VI. Petitioners Have Been Deprived Of Their Right To Appellate Review of The District Court's Ruling

28 **U.S.C. § 1291**[4] confers upon petitioners the right to appellate review of the removal of their Guardian *ad litem* and counsel for the Guardian. ***Forney v. Apfel*** (1998) ___ U.S. ___,

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[4]The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . .

There has been no appellate review of the District Court's removal of the original Guardian *ad litem* and counsel. Petitioners' prior Petition for a Writ Of Mandamus, for review of the issues presented herein, was denied by the Ninth Circuit, on August 12, 1996, on the basis that the need for extraordinary relief had not been shown. By denial of the extraordinary writ, the Ninth Circuit decreed that an appeal does lie to review the issues herein, but it has violated its own decree, by its denial of appellate review of the issues presented herein.

If there can be no appellate review of the removal of a Guardian *ad litem* or counsel for such Guardian, then District Courts have unbridled discretion to remove Guardians *ad litem* or counsel with impunity. This means that a federal district court can dictate the course of litigation before it. At the very least, this presents the appearance of injustice.

VII. No Settlement Distribution To Be Undone If Reversed

Although defendant United States of America, may have purchased an annuity, petitioners have yet to receive any moneys as a result of the "settlement" below. Any payments to plaintiff Kari Nicole Vers are deferred until she reaches the age of majority; plaintiff Nicole Vers is maintained in her comatose

state by funds provided by the California Medical Assistance Program (Medi-Cal Act) ***California Welfare & Institutions Code,*** § 14000 ***et seq.***; ***Title*** 22, ***California Code of Regulations***, the state program enacted pursuant to the federal Medicaid Act (***Title*** XIX of the ***Social Security Act***, 42 **U.S.C.** §1396 ***et seq***) to provide health care services to recipients of public assistance and others. Therefore, reversal of Judge Hatter's removal of the original Guardian *ad litem* and counsel will not require accounting of monies already received.

CONCLUSION

This Court should grant *certiorari* to insure that parties such as petitioners have standing to raise the issues presented herein. If petitioners do not have standing to raise the issues presented herein, then there is a finite probability, not just a possibility, that injustice in a variety of forms, will be perpetrated against incompetent parties in the federal courts.

It is necessary that this court grant *certiorari* so that the chill placed upon the vigorous advocacy of civil cases in all federal courts of this nation, by Judge Hatter's cavalier removal of the original Guardian *ad litem* and counsel for petitioners, will not be perpetuated.

Conventional wisdom is that over 95% of cases settle before trial. If an attorney must be guarded during settlement discussions, and cannot be open and frank, for fear of removal because of an alleged irreconcilable conflict with the client, there will be few, if any, meaningful settlement discussions, and a greater number of cases will go to trial, rather than settle. If the 95% of all cases that settle, is reduced by a mere 5%, to 90%, and petitioners submit that it will be reduced much further, the number of cases tried will **DOUBLE**. One does not have to be a mathematician or attorney, to realize that such an explosion of the number trials will paralyze the legal system as we know it.

Defendant United States of America has offered not a scintilla of evidence that Cpl. Joseph Vers, United States Marine Corps, was anything other than a loving and caring husband and father, who had the best interests of his comatose wife and newborn daughter in mind at all times. It is a disgrace that this young man, having served in the armed forces of this country, was removed from such a respectable position, absent even a scintilla of evidence of conflict of interest.

Nor has said defendant United States of America produced a scintilla of evidence that counsel for the original Guardian *ad litem*, acted other than in the best interests of

petitioners, his clients. It is not a mere incidence of the practice of law, when a court rules that an attorney is unfit to represent clients due to an irreconcilable conflict of interest, it is an event that cannot be satisfactorily explained to clients.

As a result of the joint conduct of the United States Attorney, the District Court and the two ***pro bono*** attorneys, at the very least, there is the appearance of collusion. The State of California has been forced to pay the entire cost of care and treatment of petitioner Nicole Allen Vers, rather than respondent United States of America, which has admitted liability for the negligent acts which rendered Mrs. Vers comatose.

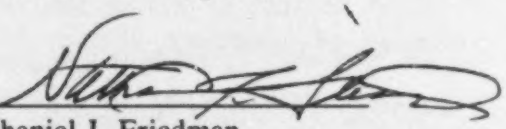
At the very least, this court should grant *certiorari* to remand this matter to the Ninth Circuit, affirming that petitioners, through their duly appointed Guardian *ad litem*, **have standing** to raise the issues presented herein, so that there will be appellate review of the District Court's removal.

In the alternative, petitioners request that the court grant *certiorari* to review all the issues presented herein, and consider transfer of the related appeal to this court, so that all issues be resolved before one forum.

Dated: August 21, 1998

Respectfully submitted,

NATHANIEL J. FRIEDMAN,
A Professional Corporation

by: 
Nathaniel J. Friedman
R. Wayne Patterson
Attorneys for Petitioners
Nicole Vers and Kari Vers

NOTICE OF RELATED APPELLATE CASE

Petitioners believe that the Court would wish to be notified of the case of NICOLE ALLEN VERS, an Incompetent, by her Permanent Conservator, and Guardian ad Litem, JOSEPH VERS; and KARI NICOLE VERS, a minor, by JOSEPH VERS, her Guardian ad Litem v. ROBERT K. HOLMES and MICHAEL A. SALAZAR, Ninth Circuit No. 98-55140.

In this related case, petitioners brought suit in California state court against the replacement Guardian *ad litem* and counsel, alleging legal malpractice, a state common law cause of action. The issues in that case are whether the replacement Guardian *ad litem* and counsel acted within the applicable standard of care when they accepted a wholly inadequate settlement without consulting with any relative or representative of petitioners, thus making these inadequately insured attorneys, insurers for the injustice that has been perpetrated upon petitioners by Judge Hatter's singular order or removal.

The replacement Guardian *ad litem* and counsel removed this related action to the United States District Court for the Central District of California, on the basis of collateral

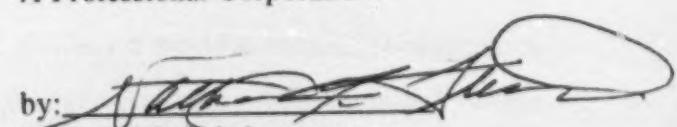
estoppel. Although the case was originally assigned to the Honorable Steven V. Wilson, United States District Court Judge, Judge Hatter saw to it that it was transferred to his courtroom. Judge Hatter promptly denied petitioners timely motion to remand, without hearing.

In that related action, the replacement Guardian *ad litem* and counsel immediately brought a motion to dismiss pursuant to FRCP 12(b)(6) on the basis of collateral estoppel. That motion was granted by Judge Hatter, again without hearing. An appeal ensued. The matter has been briefed, and awaits hearing. The estimated date of such hearing is May 1999.

Dated: August 21, 1998

Respectfully submitted,

NATHANIEL J. FRIEDMAN,
A Professional Corporation

by: 
Nathaniel J. Friedman
R. Wayne Patterson
Attorneys for Petitioners
Nicole Vers and Kari Vers

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APRIL 08,, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NICOLE ALLEN VERS, an Incompetent, by her Discharged Permanent Conservator, and Guardian ad Litem, JOSEPH VERS; KARI NICOLE VERS, a minor, by JOSEPH VERS, her Discharged Guardian ad Litem,	No. 97-55535 CV 95-6527-TJH
Plaintiff-Appellants,	
v.	
UNITED STATES OF AMERICA,	**MEMORANDUM***
Defendants-Appellee.	

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted December 1, 1997
Pasadena, California

Before: BEEZER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

The facts are known to the parties, and we will not repeat them here. A plaintiff may not "appeal from a joint stipulation to voluntary dismissal, entered unconditionally by the court pursuant to a settlement agreement." Concha v. London, 62 F.3d 1493, 1507 (1994) (citing Seldman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986)). The appellants lack standing to bring this appeal. We therefore dismiss the appeal.

DISMISSED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 20, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NICOLE ALLEN VERS, an Incompetent, by her Discharged Permanent Conservator and Guardian ad Litem, JOSEPH VERS; KARI NICOLE VERS, a minor, by JOSEPH VERS, her Discharged Guardian ad Litem,	)	No. 97-55535
	)	CV 95-6527-TJH
Plaintiff-Appellants.	)	
v.	)	
UNITED STATES OF AMERICA	)	**ORDER**
Defendant-Appellee.	)	

Before: BEEZER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Thompson and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Beezer has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 12, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NICOLE ALLEN VERS, an incompetent, by her permanent conservator, JOSEPH VERS; KARI NICOLE VERS, a minor, by Joseph Vers, her guardian ad litem,	)	No. 96-70642
	)	DC# CV-95-6527-TJH
	)	Central California
Petitioners,	)	
vs.	)	
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	
Respondent,	)	
and	)	
UNITED STATES OF AMERICA	)	ORDER
Real Party in Interest	)	

Before: BROWNING, SCHROEDER and RYMER, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All pending motions are denied as moot.

APPENDIX D

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
JULIE ZATZ
Assistant United States Attorney
Assistant Chief, Civil Division
Room 7516, Federal Building
300 North Los Angeles Street
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Attorneys for Defendant
United States of America

LODGED
Clerk, U.S. District Court
Mar 19 1997
Central District
of California
by Deputy

FILED
Clerk, U.S. District Court
Mar 21 1997
Central District
of California
by Deputy

ENTERED
Clerk, U.S. District Court
Mar 24 1997
Central District of California
by Deputy

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DISTRICT

NICOLE ALLEN VERS, an Incompetent, by her guardian ad litem, MICHAEL A. , SALAZAR; JOSEPH VERS, individually; and KARI NICOLE VERS, a minor, by	) NO. CV 95-6527-TJH (RNBx))) STIPULATION TO DISMISS)WITH PREJUDICE; ORDER)THEREON)

her guardian ad litem,)
MICHAEL A. SALAZAR,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF)
AMERICA)
)
Defendant.)
)

The above captioned action as to plaintiffs Nicole and Kari Vers is hereby dismissed with prejudice and without costs.

DATED: 3/18/97

Michael A. Salazar
MICHAEL A. SALAZAR
Guardian ad litem for
Plaintiffs Kari and Nicole
Vers

DATED: 3/19/97

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States
Attorney
Chief, Civil Division

Julie Zatz

JULIE ZATZ
Assistant United States
Attorney
Attorneys for United States

APPENDIX E

FILED
Clerk, U.S. District Court
Sep 12 1996
Central District of California
by Deputy

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NICOLE ALLEN VERS, etc, et al.,	CV 95-6527-TJH (RNBx)
	Order
Plaintiffs,	
v.	
UNITED STATES OF AMERICA	
Defendant.	

Having removed Joseph Vers as guardian *ad litem* for Nicole Allen Vers and Kari Nicole Vers, and having removed

Nathaniel J. Friedman, Esq. as counsel of record for Joseph Vers in his capacity as guardian *ad litem*,

It is Ordered that Michael A. Salazar, Esq. be, and hereby is, ***Appointed*** guardian *ad litem* for Nicole Allen Vers and Kari Nicole Vers.

It is further Ordered that Michael A. Salazar, Esq. and Robert K. Holmes, Esq. be, and hereby are, ***Appointed*** counsel of record for Michael A. Salazar in his capacity as guardian *ad litem*.

It is further Ordered that Michael A. Salazar, Esq. and Robert K. Holmes, Esq. shall provide their services *pro bono*.

It is further Ordered that Nathaniel J. Friedman, Esq. shall provide a copy of his case file to the newly appointed guardian *ad litem* and his attorneys within five days of receiving this order. Their addresses are:

Michael A. Salazar, Esq.	Robert K. Holmes, Esq.
Suite 220	Suite 400
119 South Atlantic Boulevard	1111 North Brand Boulevard
Monterey Park, CA 91754	Glendale, CA 91202
(818) 281-7743	(818) 241-8500

It is further Ordered that the United States' *ex parte* application for a status conference be, and hereby is, ***Denied***.

However, counsel are advised that the Court will not tolerate unprofessional or disrespectful behavior from any counsel.

Date: September 12, 1996

Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

APPENDIX F

NORA M. MANELLA
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Assistant United States Attorney
Chief, Civil Division
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Telephone: (213) 894-7349

Attorneys for Defendant
United States of America

LODGED
Clerk, U.S. District Court
Jul 29 1996
Central District
of California
by Deputy

FILED
Clerk, U.S. District Court
Aug 2 1996
Central District
of California
by Deputy

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NICOLE ALLEN VERS, an Incompetent, by her permanent conservator, JOSEPH VERS, individually, and KARI NICOLE VERS, a minor, by JOSEPH VERS, her guardian ad litem,	) NO. CV 95-6527-TJH (RNBx)) ORDER (Proposed)
Plaintiffs,	)

v.)
)
UNITED STATES OF AMERICA)
)
)
Defendant.)
)

Defendant United States' Motion For Appointment of Attorney/Guardian Ad Litem For Plaintiffs Nichole Allen Vers and Kari Nichole Vers came on for hearing on July 29, 1996, before this Court. After consideration of the moving papers and the attachments thereto, as well as the arguments advanced at the hearing,

IT IS HEREBY ORDERED, JUDGED AND DECREED that:

1. Joseph Vers and Nathaniel J. Friedman are removed respectively as conservator/guardian ad litem and attorney for Nichole Allen Vers and Kari Nichole Vers for all purposes arising out of the above-captioned lawsuit;

2. Attorney Nathaniel J. Friedman shall continue to represent plaintiff Joseph Vers in his individual capacity only;

3. On or before August 12, 1996, the Court shall notify the parties of the identity of the attorney

conservator/guardian ad litem appointed by the Court to represent plaintiffs Nichole Allen Vers and Kari Nichole Vers for all purposes arising out of the above-captioned lawsuit.

DATED: 8/2, 1996

Terry J. Hatter, Jr.
UNITED STATES
DISTRICT JUDGE

Presented by:
NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

Julie Zatz
JULIE ZATZ
Assistant United States Attorney
Assistant Division Chief